

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2008-105918-001 DT  
CR2007-157375-001 DT  
CR2006-005115-001 DT

08/27/2012

HONORABLE KAREN POTTS

CLERK OF THE COURT  
S. Yoder  
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

MARCUS LADALE DAMPER (001)

MARCUS LADALE DAMPER  
ASPC - TUCSON #237501  
PO BOX 24400  
TUCSON AZ 85734

COURT ADMIN-CRIMINAL-PCR

PCR DISMISSED

The Court has reviewed the defendant's "Motion to Re-Instate Rule 32 Proceeding's" filed August 6, 2012. The Court construes this request to be an untimely petition for post-conviction relief. On October 7, 2010, the Court issued a minute entry notifying the defendant that the notice of completion had been filed and he had 45 days to file a pro per petition for post-conviction relief. Defendant failed to file a petition and as a result his first Rule 32 Proceeding was dismissed on January 11, 2011. This is defendant's second Rule 32 Proceeding and it has been initiated in an untimely fashion.

In criminal matter CR 2008-105918-001, following a jury trial, the defendant was convicted of one count of Second Degree Murder, a Class 1 Dangerous Felony; and Misconduct Involving Weapons, a Class 4 Felony. The Court sentenced the defendant on December 19,

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2008, to an 18 year term of imprisonment. The sentence was to run concurrent with CR 2006-005115-001.

In criminal matter CR 2006-005115-001, the Court found that the defendant violated the conditions of probations on one count of Aggravated Assault, a Class 6 Felony. The Court sentenced the defendant on December 19, 2008, to a 1 year term of imprisonment. The sentence was to run concurrent with CR 2008-105918-001.

In criminal matter CR 2007-157375-001, the Court found that the defendant violated the conditions of probations on one count of Possession or Use of Marijuana, a Class 1 Misdemeanor. The Court sentenced the defendant on December 19, 2008, to 90 days of incarceration in the Maricopa County Jail.

Pursuant to Ariz.R.Crim.P. 32.4(a) of the Arizona Rules of Criminal Procedure, the Notice of Post-Conviction Relief must be filed within 90 days of the entry of judgment and sentencing or within 30 days of the issuance of the final order or mandate from the appellate court. The defendant pursued a direct appeal. The Court of Appeal issued the order and mandate June 21, 2010, which means that his notice of post-conviction relief was due no later than July 21, 2010.

The defendant claims, pursuant to Ariz. R. Crim. P. 32.1(f), that the untimely filing of his notice of post-conviction relief was through no fault of his own. However, the defendant fails to include any facts, argument, or law to support his claim. Pursuant to Ariz. R. Crim. P. 32.2(b), a defendant who has filed an untimely notice of post-conviction relief must provide the Court with sufficient information to support each claim for post-conviction relief so that the Court may "pre-screen" each claim for merit. Additionally, Ariz. R. Crim. P. 32.5 states "Facts within the defendant's personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required."

The defendant also claims, pursuant to Ariz. R. Crim. P. 32.1(e), that there are newly discovered material facts which probably would have changed the verdict or sentence in her case. To be entitled to post-conviction relief based on newly discovered evidence, the defendant must show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial or appeal through reasonable diligence; the evidence is neither solely cumulative nor impeaching; the evidence is material; and the evidence

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probably would have changed the verdict or sentence. *State v. Saenz*, 197 Ariz. 487, 489, 4 P.3d 1030, 1032 (App. 2000), *see also* Ariz. R. Crim. P. 32.1(e).

Defendant fails to support this claim. The defendant does not allege any new facts. Pursuant to Ariz.R.Crim.P. 32.5: "Facts within the defendant's personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required." Ariz. R. Crim. P. 32.5. Defendant fails to provide any facts, affidavits, records, or other evidence to support this claim.

Defendant's claim is more properly analyzed under Ariz.R.Crim.P. 32.1(a). The defendant claims, pursuant to Ariz. R. Crim. P. 32.1(a), that his conviction and sentence were obtained in violation of his constitutional rights. Specifically, the defendant alleges that the use of dangerousness as an aggravator constitutes double jeopardy and violates due process. The defendant cannot raise a claim of this nature in an untimely or successive notice of post-conviction relief. *See* Ariz. R. Crim. P. 32.4(a).

Defendant is also claiming, pursuant to Ariz. R. Crim. P. 32.1(a), that he received ineffective assistance of counsel. Defendant cannot raise this claim in an untimely or successive Rule 32 proceeding because an untimely notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a).

Defendant also claims that under *Blakely v. Washington*, 542 U.S. 296 (2004), the trial court erred when it found aggravating factors that were not found by the jury. The only way that defendant can make a claim of this nature in an untimely or successive petition is pursuant to Ariz. R. Crim. P. 32.1(g), by alleging that there has been a significant change in the law that if applied retroactively to the defendant's case, it would probably affect the outcome. *Blakely* was decided prior to defendant's trial and sentence. Accordingly, defendant cannot raise a claim of this nature in an untimely petition. Additionally, defendant should have raised this issue on appeal and chose not to. Therefore, defendant would be precluded from raising this claim in a Rule 32 Proceeding. Ariz. R. Crim. P. 32.2(a).

A defendant must comply strictly with Rule 32 by asserting substantive grounds which bring her within the provisions of the Rule in order for the Court to grant relief. *State v. Manning*, 143 Ariz. 139, 141, 692 P.2d 318, 320 (1984). Defendant fails to state a claim for which relief can be granted in an untimely Rule 32 proceeding.

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IT IS THEREFORE ORDERED dismissing defendant's Notice of Post-Conviction Relief.

/ s / HONORABLE KAREN POTTS

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JUDICIAL OFFICER OF THE SUPERIOR COURT

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>.  
Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.